Jet Electric Company, Inc. *and* Local Union 342 of the International Brotherhood of Electrical Workers, AFL–CIO. Case 11–CA–18395

November 22, 2002

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On August 10, 2001, the National Labor Relations Board issued a Decision and Order[1] granting the General Counsel's Motion for Summary Judgment and finding that the Respondent had violated Section 8(a)(3) and (1) by, inter alia, refusing to consider for hire and failing and refusing to hire Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington. The Board held in abeyance a final determination of the appropriate remedy pending a remand of this case for a hearing before an administrative law judge on the limited issue of the number of openings that were available to the applicant-discriminatees under *FES*, 331 NLRB 9 (2000).

On April 23, 2002, Administrative Law Judge James M. Kennedy issued the attached decision on remand, finding that the Respondent had eight job openings within the 4 months after the first refusal to hire, and recommending that the Board order instatement and backpay, with interest, for the eight named employees.

No party has filed exceptions to the judge's decision.

The Board has considered the decision and record, and has decided to adopt the judge's rulings, findings, and conclusions, and to reaffirm the Order in the Board's earlier decision as modified and set forth in full below.

Contrary to our dissenting colleague, we decline to reexamine, sua sponte, the Board's prior summary judgment decision in this case. There, the Board found that the Respondent failed to submit a sufficient answer to the complaint, and therefore that the allegations of the amended complaint were deemed to be admitted. Thus, in finding that the Respondent refused to hire or consider for hire the discriminatees, the Board relied on the allegation that "[at] all times material and continuing to date, Respondent filled job openings at its Winston-Salem, North Carolina job site." We find as a matter of policy and sound procedure that, where summary judgment has issued and is undisputed, no purpose is served by second-guessing the Board's earlier decision.

Our colleague acknowledges that, under *FES*, when numerous applicants are involved, the General Counsel "need only show that one applicant was discriminated against to establish a refusal-to-hire violation warranting a cease-and-desist order." *FES*, supra at 14. Based on that holding, the Board found in the earlier decision that the allegations of the amended complaint, including that the Respondent was filling job openings, were sufficient to warrant granting summary judgment on the refusal-to-hire allegation and issuing a cease-and-desist order. Under *FES*, no hearing was required to reach a conclusion on the allegation and remedy to this extent.

However, the Board found that a hearing was necessary in order to determine whether the affirmative remedies of backpay and instatement were appropriate.[2] These remedies require a showing of the number of openings available. *FES*, supra at 14. That information was not included in the amended complaint and, because the Board found that the Respondent had not adequately answered the complaint, no hearing had been held.

By remanding this issue for a hearing, the Board complied with the directive of *FES* not to defer the question of the availability of openings to the compliance stage. Id. Rather than a "post-decision hearing," as it is characterized by our dissenting colleague, the Board ordered an *initial* hearing on a matter as to which summary judgment was *not* granted. Also in accordance with the process established in *FES*, the General Counsel amended the complaint to identify the openings of which he was aware before the hearing. Id.

We view our difference with our dissenting colleague as essentially procedural in nature. In the posture of this case, particularly the Respondent's failure to file exceptions, we simply would not revisit this matter.

ORDER

The National Labor Relations Board orders that the Respondent, Jet Electric Company, Inc., Winston-Salem, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening not to hire employees because of their affiliation with a union.

(b) Threatening to interrogate employees regarding their union affiliation.

(c) Advising employees and applicants that union-affiliated employees would not be hired.

[1] 334 NLRB No. 133.

[2] Compare *Center State Beef*, 327 NLRB 1246 (1999) (summary judgment granted finding violations, but remanded to administrative law judge for hearing regarding whether *Gissel* bargaining order warranted).

(d) Threatening to discharge employees for their affiliation with a union.

(e) Interrogating employees regarding their union affiliation and membership.

(f) Refusing to consider for hire or to hire applicants because of their affiliation with a union.

(g) Changing its hiring practices and policies in order to deny employment to union-affiliated applicants.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the changes in hiring practices and policies designed to deny employment to union-affiliated applicants.

(b) Within 14 days from the date of this Order, offer Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington instatement to a job for which they applied or a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

(c) Make Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the judge's decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire or consider for hire Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington, and within 3 days thereafter notify the applicants in writing that this has been done and that the unlawful refusals to hire or consider for hire will not be used against them in any way.

(f) Within 14 days after service by the Region, post at its facilities in Winston-Salem, North Carolina, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 1999.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 22, 2002

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Wilma B. Liebman, Member

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Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER COWEN, dissenting.

I would not adopt the judge's April 23, 2002 decision on remand and recommendation to order Respondent to provide the eight alleged discriminatees instatement and backpay.[1] The judge's findings are improper because they were rendered *after* the Board issued its August 10, 2001 decision granting the General Counsel's Motion for Summary Judgment. While the Board's August 10, 2001 decision is the law of the case, and I accept it as such, I do not accept the judge's findings rendered after this final decision. As explained further below, the Board cannot remedy its error of granting summary judgment

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] While no party filed exceptions to the judge's April 23, 2002 decision on remand, it is well established that the Board may exercise its remedial discretion even in the absence of exceptions. *WestPac Electric*, 321 NLRB 1322 (1996).

without sufficient allegations or record evidence by ordering a post-decision hearing to fill in the missing facts.

The Board granted summary judgment on the basis that the Respondent had failed to file an adequate answer to the complaint. Although I would find the Respondent's answer to the complaint adequate,[2] I have a different basis for finding the Board's granting of the General Counsel's Motion for Summary Judgment was in error as to the unlawful refusal-to-hire allegations. The Board's finding of these refusal-to-hire violations in the absence of allegations or record evidence regarding the number of openings that were available to the alleged discriminatees was in direct contravention of the clear standards set forth by the Board in *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

As to the issue of available job openings, the General Counsel merely alleged in the original complaint that the Respondent "filled job openings" at "all material times." The Board, in my view, erroneously found this ambiguous, conclusory allegation to be sufficient under *FES*.[3] The Board went on to find that the "undisputed" allegations of the complaint were "sufficient under *FES* to establish a refusal-to-hire violation warranting a cease-and-desist order."[4] Implicitly acknowledging the deficiency in the General Counsel's allegations of job openings, however, the Board's order contains neither a specific nor a general instatement provision.

In the absence of allegations or record facts regarding the number of available job openings, the Board should have denied summary judgment as to the unlawful refusal to hire allegations. Instead the Board found that the Respondent unlawfully refused to hire all eight alleged discriminatees[5] and remanded the case to the judge with an order to essentially fill in this evidentiary gap *post-decision*. The General Counsel thereafter issued an amended complaint on September 5, 2001,[6] which listed specific dates upon which eight job openings allegedly occurred. The Respondent filed an answer denying the allegation and a hearing was thereafter conducted before the judge. The judge found that eight job openings occurred on various dates (only two of which matched the dates in the amended complaint) within the 4 months after the first application by an alleged discriminatee.

In finding the refusal-to-hire violations without allegations regarding the dates and numbers of job openings, the Board majority did exactly what it said it would not do in *FES*. The dictates of the Board's *FES* decision are clear. In order to make out a prima facie case of unlawful refusal to hire, the General Counsel—*at the hearing on the merits*—must show, inter alia, that "the respondent was hiring, or had concrete plans to hire,[7] at the time of the alleged unlawful conduct."[8] As thoroughly discussed in *FES*, the Board was taken to task in previous cases by the U.S. Courts of Appeals for the Sixth and Seventh Circuits for failing to require the General Counsel in unlawful refusal-to-hire cases to establish the availability of job openings as part of the General Counsel's prima facie case and instead allowing such proof to be deferred to the compliance stage of the proceeding.[9] The Board in *FES* adopted the Seventh Circuit's approach in *Starcon*, holding in relevant part that:

> [I]n cases involving numerous applicants, the General Counsel need only show that one applicant was discriminated against to establish a refusal-to-hire violation warranting a cease-and-desist order. If the General Counsel seeks an affirmative backpay and instatement order, he must show that there were openings for the applicants. Consequently, . . . the General *Counsel must show at the hearing on the merits the number of openings that were available . . . . Proof of the availability of openings cannot be deferred to the compliance stage of the proceeding.*[10]

Furthermore, the Board made clear that the General Counsel *must plead* such facts regarding the number of available openings. Specifically, the Board stated that "[i]f the General Counsel is seeking a remedy of instatement and backpay based on findings that he knew or should have known have arisen prior to the commence-

[2] I agree with former Chairman Hurtgen's dissenting opinion that the General Counsel's Motion for Summary Judgment should have been denied. See *Jet Electric Co.*, 334 NLRB No. 133, slip op. at 3–4 (2001). The pro se Respondent filed a timely response stating that "I deny all complaints directed at me, James A. Jackson, or my company Jet Electric, Inc." I agree with Chairman Hurtgen, for the reasons stated by him, that this response was a sufficient denial of the complaint's allegations, particularly in light of the greater latitude typically accorded unrepresented parties.

[3] *Jet Electric Co.*, supra, slip op. at 1–2.

[4] Id. slip op. at 1.

[5] Id. slip op. at 2 ("In . . . refusing to hire, the above-named applicants . . . the Respondent has been discriminating in regard to the hire . . . of its employees and applicants for employment . . . violating Section 8(a)(3) and (1) of the Act.").

[6] I am aware of no basis for permitting the General Counsel to amend his complaint after the Board has already issued its decision in the case.

[7] As noted in *FES*, the "General Counsel may establish a discriminatory refusal to hire even when no hiring takes place if he can show that the employer had concrete plans to hire and then decided not to hire because applicants for the job were known union members or supporters." *FES*, 331 NLRB at 12, fn. 7 [citations omitted]. The present case does not involve this type of allegation.

[8] Id. at 12.

[9] Id. at 9–11, 14 (discussing *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953 (6th Cir. 1998) and *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999)).

[10] Id. at 14 (emphasis added).

ment of the hearing on the merits, he *must allege* and *prove the existence of those openings* at the unfair labor practice hearing. If he seeks such a remedy based on openings arising after the trial has begun or based on openings arising before the opening of the trial that he neither knew or should have known had arisen, he may move to amend the complaint."[11]

The Board majority in the present case erred, in my view, by failing to recognize that in order to establish a refusal to hire violation as to even one of the alleged discriminatees, the General Counsel had to allege that "there was *at least one available opening* for the applicant."[12] The reasoning behind this requirement is simple: an employer cannot fail to hire an applicant into a position that does not exist.[13] It is axiomatic that in order to satisfy this burden, the General Counsel must be able to show the dates upon which one or more job openings existed. Without such proof, the Board cannot determine whether the positions were available, i.e., whether the respondent was hiring at the time of the alleged discriminatees' applications.

In conclusion, looking solely at the Board's August 10, 2001 decision as to the unlawful refusal-to-hire claims, we are left with the Board's finding of 8(a)(3) and (1) violations for the refusal to hire eight alleged discriminatees without findings of fact on the issue of how many openings, if any, were available at the time of the alleged discriminatees' applications. Without such findings, no backpay and instatement remedy is available to the alleged discriminatees with regard to the refusal to hire violations.

Dated, Washington, D.C., November 22, 2002

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William B. Cowen, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten not to hire employees because of their affiliation with a union.

WE WILL NOT threaten to interrogate our employees regarding their union affiliation.

WE WILL NOT advise our employees or applicants that union-affiliated employees will be not hired.

WE WILL NOT threaten to discharge our employees for their affiliation with a union.

WE WILL NOT interrogate our employees regarding their union affiliation and membership.

WE WILL NOT refuse to consider for hire, or refuse to hire, applicants because of their affiliation with a union.

WE WILL NOT change our hiring practices or policies to deny employment to union-affiliated applicants.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the changes in our hiring practices or policies designed to deny employment to union-affiliated applicants.

WE WILL offer Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington instatement to a job for which they applied or a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

WE WILL make Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, together with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire or consider for hire applicants Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington, and WE WILL within 3 days thereafter notify the applicants in writing that this has been done and that

[11] Id. (emphasis added).
[12] Id. at 12 (emphasis added).
[13] Id. ("[T]he question in a discriminatory hiring case is why the applicant was not taken into the employer's work force. That question presupposes that there were appropriate openings in the employer's work force available to the applicant.")

the unlawful refusals to hire or consider for hire will not be used against them in any way.

JET ELECTRIC COMPANY, INC.

Ronald C. Morgan, for the General Counsel.
James A. Jackson, President, of Winston-Salem, North Carolina, for the Respondent.
Gary M. Maurice, Business Manager, of Winston-Salem, North Carolina, for the Charging Party.

DECISION ON REMAND

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was heard in Winston-Salem, North Carolina, on February 27, 2002, pursuant to a limited remand issued by the National Labor Relations Board in its Decision and Order of August 10, 2001 (334 NLRB No. 133). The Board's decision was pursuant to the General Counsel's motion for summary judgment as Respondent had failed to file an adequate answer to the operative complaint.

In its decision the Board partially granted the motion for summary judgment and found that Respondent had violated Section 8(a)(1) of the Act in a variety of ways and had also violated Section 8(a)(3) of the Act by refusing to consider for hire or to hire eight applicants because of their affiliation with the Union. However, it was unable to determine if a backpay and instatement remedy was warranted. More specifically, the Board observed that its decision in *FES*, 331 NLRB 9 (2000), obligated the General Counsel to establish the number of jobs available in order to warrant a backpay remedy. Since the General Counsel had not done so, and due to the limited findings of fact based on the pleadings, the Board was unable to determine whether a backpay and instatement order was appropriate. It therefore issued the limited remand order to allow it to make that judgment.

The remand instructed the Regional Director for Region 11 to ascertain "how many job openings were available at times relevant to the discriminatees' applications for work." The amended complaint of February 26, 2001, which was the basis for the Board's summary judgment, had listed by name eight individual applicants for employment, together with the dates they were denied employment. The first was alleged to have occurred on February 17, 1999, and the last was alleged to have taken place on May 5, 1999. The Board adopted the allegations of the complaint as its findings of fact.

Upon receipt of the remand, the Director issued an amendment to the amended complaint and notice of hearing on September 5, 2001. In it he listed eight dates on which he alleges eight job openings occurred. Respondent filed an answer denying the allegation and the instant hearing ensued. The sole witness was Respondent's president, James A. Jackson.

The General Counsel is the only party who chose to file a brief. It has been carefully considered. In that brief, the General Counsel now asserts that 79 job openings occurred after February 17, 1999.

I. THE FACTS

A. The Setting

Respondent is a nonunion electrical contractor performing commercial electric construction work in North Carolina's Triad area, specifically Winston-Salem, Greensboro, and High Point. It is essentially a one-man operation, entirely run by Jackson.[1] In 1998 it had undertaken the electrical installation work at a Super 8 Motel construction project in Winston-Salem. Sometime in mid-February 1999,[2] its labor subcontractor, GHW Electric, left the job, leaving it uncompleted. As a result, Respondent had to scramble to find employees to perform the work, for it did not then have a sufficient number of its own workmen. The electricians and helpers it found came from various sources. One came from GHW, while others were called from temporary labor suppliers, including Tradesmen International, Labor Finders, and Labor Ready.

The Board found during this time period that Respondent refused to consider for hire and failed and refused to hire Rodney Booe (February 17), Stanley Grace (February 19), and Jerry Loftis (February 23). The next group whom the Board found Respondent had discriminated against by refusing to consider and failing and refusing to hire included Roger Stanley (March 10), Douglas Summers (March 15), and Allen Craver (March 16). These were followed by similar discrimination against Gary Maurice[3] (April 28) and Percival Millington (May 5).

The September 5, 2001 amendment is not congruent with these dates. There, the Regional Director asserted that the slots to which these discriminatees were entitled opened March 19, April 5, May 7, May 14, June 25, July 20, August 5, and August 27.

It was during this general time frame that a new project, the Wingate Inn in Winston-Salem began (about March 15) and the Super 8 project ended (June 21). The Winston-Salem Wingate Inn project continued until January 14, 2000. On August 31, Respondent began two other projects, another Wingate Inn, located in Greensboro, and a Central Carolina Bank site in High Point. It completed the High Point project on August 25, 2000, and the Greensboro Wingate Inn on November 15, 2000. It did not perform any more work until late December 2001, a hiatus of more than a year. Because of that circumstance, the General Counsel agrees that after the completion of the second Wingate Inn project in November 2000, there were no more slots to which the discriminatees could have been assigned.

Jackson testified that he hires three types of employees, helpers, electricians, and foremen. Foremen are statutory supervisors since they have authority to hire, and are not of concern here. He says that he further breaks down the electricians by the amount of experience they have, ranging from appren-

[1] JUDGE KENNEDY: . . . Do you—do you have an office support staff of any kind?
MR. JACKSON: No sir.
JUDGE KENNEDY: It's just you, is that it?
MR. JACKSON: It's just me.

[2] All dates are 1999 unless noted otherwise.

[3] Maurice is the Union's business manager and its representative in this case.

tice, with 2–3 years experience to journeyman. He agrees that an electrician can perform the work of a helper or an apprentice. He said:

> Q. (By Mr. MORGAN): Okay, the question I'm asking you, Mr. Jackson, is the people that you hire[d] or worked for Jet Electric in the journeyman or electrician classification, would you agree that they were also qualified to perform jobs as helpers or apprentices or any other—?
>
> A. Yes sir.
>
> Q. If they were working as an electrician for you, or could work for you as electrician, they could perform any job that Jet Electric had?
>
> JUDGE KENNEDY: Well, with the modification that they're probably not going to be forem[e]n.
>
> Q. Right, I'm not—I'm talking about employee positions.
>
> A. No sir.
>
> Q. Would you not agree that—that in general [an] electrician could do the work of a helper?
>
> A. Yes sir.
>
> Q. Okay and an electrician could do the work of what you called a two or three year apprentice?
>
> A. Yes sir.

B. The Hiring

A review of the documentary evidence, together with Respondent's president, Jackson's testimony leads to several general observations. First, Respondent sought to finish the Super 8 job principally with employees from temporary agencies. It added only five to its own payroll: Thomas Hawks (February 23, a transfer from GHW), Kenneth Hawks (March 22), Bruce Goad (April 5, a transfer from Tradesmen), Donald Daniels (April 27, a transfer from Labor Ready) and Michael Powell (May 3) (originally hired April 7 for the Wingate, terminated after 2 days work). Both Daniels and Powell were helpers.

However, the temporary agencies referred 24 electricians and/or helpers to the Super 8 job, including Goad and Daniels. Of that number, 9 worked for only 1 day and 3 worked for only 2 days. While there is no evidence one way or the other concerning their competency, it does not seem to be much of a stretch to conclude that these short-time individuals are not representative of whether or not a regular job can be assigned to each of them. More likely, they were part of a winnowing process aimed at keeping the best performers and letting the poorer performers fall by the wayside. Those failures might be due to lack of skill or speed in performance; they might also be due to the employee's decision not to stay. And, since all of those came from temporary agency referrals, it is quite likely that some of those 1- or 2-day employees were called only for that duration.

It seems, but is not entirely clear, that Respondent stopped using referrals from the temporary agencies about April 9 with the departure of two temps from the Winston-Salem Wingate on that date. At that project, the winnowing process almost stopped as only 2 of the 16[4] direct hires lasted 2 days or less.

The record is not as clear with respect to direct hiring at the second Wingate Inn and the Central Carolina Bank projects. The General Counsel has offered only the timecards for the year 2000, and they undoubtedly cover both projects. Indeed, since both of those projects began in late August 1999, the 1999 timecards cover those projects as well as the Super 8 and much of the Winston-Salem Wingate. Yet, the timecards do not show to which project the named employees were assigned. Jackson testified that some individuals were transferred back and forth. Since the projects were running simultaneously, they no doubt had different needs, particularly since the bank project was running much faster (probably because it was a smaller job) and the two Wingates were at different stages. The post-August 1999 and the 2000 timecards do show when new hires came aboard and also show, at least on some occasions, that a number of new hires did not last more than a day or two. It would appear that the winnowing process had resumed, assuming it had ever stopped.

Furthermore, the record does not definitively reflect whether Respondent utilized the services of the temporary agencies in 2000, though it appears it did not. Neither Labor Finders nor Labor Ready show any billings after April 30. Tradesmen International's billings for electricians, stopped in March, but resumed on December 10, 17, 24, and 31, and although referencing a Wingate Inn project, do not specify whether it was in Winston-Salem or in Greensboro. Since the Winston-Salem Wingate was in the wind-down stage, it is most likely that these were assigned to Greensboro, although, pick-up work at Winston-Salem is possible as well. The December 10 billing shows a referral of five employees, two of whom worked only 8 hours. The three who worked more than 8 hours stayed for the following 2 weeks. Yet, those three vanished with the December 31 billings. In their place are two others, neither of whom worked a full week. Although the record is scant, it is likely that the winnowing process was in effect there, too.

II. ANALYSIS

In *FES* the Board, in describing the elements of a discriminatory refusal-to-hire violation listed the three elements necessary to make out such a case. It said the elements are: (1) a showing that the respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextuous or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicants. The Board then stated that if those elements are shown, a cease-and-desist order is appropriate, but if the General Counsel is seeking an instatement order together with backpay, he must show at the hearing on the merits that there

[4] The 16 do not include the June 25 transfers of Thomas Hawks, Kenneth Hawks, and Donald Daniels to the Wingate Inn from the Super 8 job upon its completion.

were openings for the applicants. Moreover, the General Counsel must show the number of openings; if there is more than one alleged discriminatee, then the General Counsel must show the number of openings which were available. *FES*, supra at 14.

Here the General Counsel, upon receipt of the remand, modified the complaint to allege that there were eight specific dates between March 19 and August 27. Counsel for the General Counsel now argues, after the conclusion of the evidence, that he has shown there were some 79 job openings between February 17 and the conclusion of the second Wingate Inn job in November 2000. That number is based upon his count of individuals who were either directly hired or were referred to one of the projects by a temporary agency.

First, it is not at all clear that the Board's order included referrals from temporary agencies. Usually temporary agencies provide short-term, temporary work. Occasionally, and it occurred here, the employer will offer "permanent" employment to an individual who has been referred by such an agency and the employee will then be transferred to the employer's own payroll.

I observe that the Board, in its summary judgment decision, ordered Respondent to cease and desist "changing its hiring practices and policies in order to deny employment to union-affiliated applicants." Despite that language, there is no suggestion, much less a finding, that the order is aimed at the use of temporary employees dispatched by temporary employment agencies. Nor can such a purpose be discerned from the operative complaint. Surely if the General Counsel believed that Respondent had improperly used the temporary agencies to shield itself from unionization, the complaint would have said so. It did not, and I do not believe it can be assumed from the Board's order that such was the General Counsel's intent. In fact, the General Counsel either knew or should have known that the reason Respondent began using temporary agencies in March was because its subcontractor, GHW, had walked off the job without notice, leaving Respondent in a serious bind. That incident does not suggest that the use of temporary employment agencies had anything to do with an effort to avoid unionization, only that Respondent was trying immediately to remedy a business crisis. Accordingly, I reject the General Counsel's contention that job openings filled by the temporary agencies' referrals were the job openings which the discriminatees sought.

Second, I conclude that the methodology of simply counting the hires over a 22-month period (February 1999–November 2000) results in a severe overstatement of what actually occurred. Among other things, the February 17 putative start date coincides only with the hire of Thomas Hawks as he came over from GHW. Clearly that was not a job opening which Rodney Booe, for whom the Board found a violation on that date, would have received.

On March 22, Respondent hired Kenneth Hawks, and Booe may very well have fit there. However, the second discriminatee, Grace (February 19 violation) could have as well. So could Loftis who the Board found had been discriminated against on February 23, Stanley (Board finding of March 10), Summers (March 15), and Craver (March 16). Respondent did not hire again until April 5, but this was Goad who was being transferred from Tradesmen International. There is no showing that any of the discriminatees would have offered that job, as Goad's abilities by then were a known quantity. That job was not an opening which the discriminatees would have filled. (An opening did occur April 6.) Similarly, on April 27, Respondent transferred Donald Daniels to its own payroll from Labor Ready. Again, no discriminatee would have been given that job, for the same reasons, although an opening did occur on April 26.

Moreover, solely counting hires does not take into account the winnowing process, for it cannot seriously be argued that the discriminatees were seeking jobs of only 1 or 2 days' duration or some type of temporary work. They must be assumed to have been seeking longer jobs, although by the very nature of construction work, that employment is likely to be of relatively short duration. And even though the discriminatees were seeking jobs longer than 1 or 2 days, it does not follow that "permanent" or project-length jobs were available shortly after each made his application. The available job might have been temporary [in the *Lloyd A. Fry Roofing Co.*, 121 NLRB 1433, 1437–1438 (1958); *M. J. Pirelli & Sons*, 194 NLRB 240, 250 (1971) sense] and, therefore, not an actual opening. Under *FES*, bona fide job openings, not simply fill-in work, must be demonstrated. That is the General Counsel's burden and he made no effort to identify the true openings.

Third, *FES* speaks in terms of job openings "at the time of the alleged discrimination." Literally, that occurs in the Board's statement of the elements of a refusal to hire violation. But timing is inextricably intertwined with the freshness of the discriminatee's application. The application and the job opening must be relatively close in time; there must be a logical, contemporary, connection between the two where a finder of fact can say confidently that absent the discrimination, a specific employee should have been offered a specific job or jobs. Indeed, the Board's order here requires me to find "how many job openings were available *at times relevant to the discriminatees' applications* for work." (Emphasis added.) Supra at 11. It is not enough, as the General Counsel implies, to say that a victim of a refusal to consider an application occurring in February 1999 is entitled to backpay for a job which became open in July 2000. Some kind of nexus in time must be shown, and the amendment seems to have been an effort to do that. Yet, counsel for the General Counsel has made no effort to follow through in his brief. Instead, he has substituted the number count of 79.

Fourth, the Board in *Dean General Contractors*, 285 NLRB 573 (1987), in the process of refining the standard remedy for unlawful discharges in the construction industry, observed that reinstatement as a standard remedy was appropriate and that it could not presume that an employee would not be carried from one project to a succeeding one. It therefore adopted the standard reinstatement remedy to all cases, allowing a respondent to demonstrate at the compliance stage that backpay would have been cut off if a transfer to another construction site would not have been made.

Similarly, we know from General Counsel Exhibit 2 that some regular employees were transferred from the Super 8 to

the first Wingate on June 25 when the Super 8 job ended. Second, there is Jackson's testimony to the same effect as well as his testimony that mid-job reassignments took place.

> Q. (By Mr. MAURICE) You've pretty much acknowledged already in your testimony Mr. Jackson that you had a number of employees on four job sites, two in Winston-Salem, one in High Point, and one in Greensboro. Did you in fact, transfer some of the employees from one job to another and what I would assume there is that that would be employees that established themselves with you as dependable employees? You didn't hire separately for each job—did you?
>
> A. No sir.
>
> Q. You did transfer people. And at times they would work even during the week on one job, possibly jump to the other on the weekend as you needed them?
>
> A. Yes sir.
>
> Q. The continuity of employment—
>
> . . .
>
> JUDGE KENNEDY: But Mr. Maurice's question is . . . The answer to his question even though it was a little bit convoluted is yes, you move people around and they were—
>
> MR. JACKSON: Yes sir, I did.

We know, therefore, that since transfers from project to project did occur, one cannot make the assumption that a job opened for which a discriminatee can make a claim when employees were transferred or when a new project or a new phase of a project began. Accordingly, incumbent employees must be seen to have been preferred over new hires. And, it must follow that since no new job opened when that occurred, it could not have been a discriminatory act. Indeed, the General Counsel has not made that contention.

Under *FES*, the Board has given the General Counsel wide latitude to determine whether a discriminatory refusal to consider should be converted to a discriminatory refusal to hire, together with the concomitant remedies of backpay and instatement. Specifically, the Board said, supra at 14, "If the General Counsel is seeking a remedy of reinstatement (sic) and backpay based on openings that he knows or should have known have arisen prior to the commencement of the hearing on the merits, he must allege and prove the existence of those openings at the unfair labor practice hearing. [Footnote omitted] If he seeks such a remedy based on openings arising after the trial has begun or based on openings arising before the opening of the trial that he neither knew nor should have known had arisen, he may move to amend the complaint."

Here, the General Counsel took the opportunity to amend the complaint when the matter was remanded to the Regional Director with instructions. He alleged eight dates, presumably after an appropriate investigation. Indeed at the hearing, the General Counsel was entirely familiar with Respondent's hiring records. Therefore, the dates chosen in the September 5, 2001 amendment are the dates which in the Board's words the General Counsel "knew or should have known." Counsel for the General Counsel has made no effort to further amend the complaint, except by way of its assertion in the brief that 79 openings had occurred between February 17, 1999, and November 15, 2000. While the bare facts concerning hiring decisions are not in real dispute during that period, there are a number of conclusions which could be drawn from those bare facts about which reasonable persons could disagree. Furthermore, when a complaint is amended to require more specificity, as this was, it is contrary to the purposes of the Act to go in the opposite direction, placing the general ahead of the specific. Moreover, such a maneuver is contrary to the remand's directive to find openings "at times relevant" to the applications. Accordingly, I find it appropriate to hold the General Counsel to the specificity set forth in the September 5, 2001 amendment.

Furthermore, I find that the Board's directive requires the General Counsel to show job openings reasonably contemporaneous either with the job applications as found by the Board or, secondarily, with the openings alleged to have occurred as set forth in the amendment.

Given Jackson's testimony that electricians can do both apprentice work and helper work, I shall also assume that the eight applicants are capable of doing whatever work was being offered when it became available. I make that assumption with the full recognition that in actuality, some of the applicants who were journeymen electricians might have turned down helper work had it been offered because of the lower pay rate. It is nonetheless appropriate here because the Board has found them to be qualified for any of the openings which occurred in this general time frame. Jackson's testimony is consistent with the Board's finding and I shall assume for the purposes of this case, that if a job became open, one of the applicants would have taken it if offered.

The first hiring which occurred after Booe's February 17 application took place a month later, March 19, a date consistent with the first date in the amendment. On that date Respondent hired two helpers, Darryl Springer and Reginald Fuller. These were bona fide job openings as Springer remained employed through May 17 and Fuller through April 15. At that time Booe, Grace, Loftis, Stanley, Summers, and Craver had all filed applications which had not been properly considered. Therefore, two of those six are eligible to be considered for instatement and backpay as of March 19.

Skipping the Goad transfer on April 5, the next hire which occurred was on April 6 when Respondent hired Randy Lunsford as a helper. This, too, was a bona fide job opening as Lunsford remained employed until June 25, when he ceased working, for he was not transferred to the Winston-Salem Wingate Inn project. This date is closely connected to the April 5 allegation found in the amendment. I find that one job opening occurred here which could have been filled by four of the same six applicants (the other two having filled the previous two positions).

The fourth and fifth job openings occurred on April 26, when Respondent hired Steve Heath and Charles Taylor as helpers. These were also bona fide job openings. Heath remained employed from that date through October 29, 2000, and Taylor remained employed through July when he quit. Although the April 26 hire date does not match any allegation in the amendment, I regard it as contemporaneous. Therefore, two more of the original six applicants would be entitled to backpay for

those jobs, although three of them would have been assigned to the earlier openings.

Noncognizable transfers occurred on April 27 and May 3 when Daniels and Powell were transferred to the Wingate from the Super 8.

The sixth job opening occurred on May 7. This, too, is a date alleged in the amendment. On that date Respondent hired Barry Smith as an electrician. This is a bona fide opening and Smith remained employed until July 8 when he quit. Maurice had applied on April 28 and Millington on May 5, so those two had become eligible for this opening even as one of the original six remained unremedied. This opening entitles one of the remaining three discriminatees to backpay.

The seventh job opening occurred on May 17 when Respondent hired Ricky Coone as an electrician. This date also coincides with May 14,[5] as alleged in the amendment. Again, this is a bona fide job opening and Coone remained employed through the pay week ending February 21, 2000.[6] Backpay for this job opening would have gone to one of the two who had not been assigned the May 7 opening.

The eighth opening occurred when Respondent hired Lee Upchurch as a helper on June 1. Upchurch remained employed from June 1 through July 16, demonstrating that it was a bona fide opening. The remaining applicant should receive backpay for this position.

III. REMEDY

The Board was unable to determine from the pleadings whether Respondent had violated Section 8(a)(3) of the Act only by a refusal to consider or whether it was actually a refusal to hire. It remanded the matter so that it could determine whether Respondent was in the process of hiring at the time it committed violations of Section 8(a)(3). It held in abeyance the determination of any further appropriate affirmative remedy.

In view of my finding that Respondent had eight job openings within the 4 months after the first refusal to consider, I recommend that the Board issue a remedy requiring the instatement of the eight named employees to the job openings found above, together with backpay and interest. Accordingly, I recommend that the Board find that Respondent violated Section 8(a)(3) when, on the dates set forth in the decision, it refused to offer employment to Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington. I further recommend that the Board order Respondent to offer them instatement to those or substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges. It should also order Respondent to make them whole for lost earnings, if any, together with interest. Backpay should be computed from the date they would have been hired less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In this regard, given the fact that Respondent's practice concerning the transfer of employees from one job to another is a mixed practice, I do not believe it to be appropriate to adhere to the presumption set forth in *Dean General Contractors*, 285 NLRB 573 (1987), which presumes that the discriminatees would be transferred to new projects. Here, the record indicates that it is more appropriate to match a discriminatee to a hiree, as shown above, and then track each slot as it actually provided employment to the hiree.

IV. RECOMMENDATION

I further recommend that the Board supplement its Order by inserting the following in paragraph 2 of its Order and relettering subparagraphs (b), (c), and (d) as (d), (e), and (f):

> (b) Within 14 days from the date of this Order, offer Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington instatement to a job for which they applied or a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.
>
> (c) Make Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth above.
>
> (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

I also recommend that the notice to employees be modified to incorporate the above changes and to comply with recent changes in Board notices.[7] See the Appendix for a proposed notice.

Dated: April 23, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten not to hire employees because of their affiliation with a union.

[5] The May 1999 timecards show Coone began on a Monday during the pay week ending May 20. However, May 20 is a Thursday and Respondent's pay weeks end on Fridays. The General Counsel's summary asserts that Coone's first day was May 14, a Friday. I believe that to be an error and that he actually began on Monday, May 17, in the pay week ending May 21.

[6] Coone's return in August 2000 is irrelevant to this slot.

[7] See *Ishikawa Gasket America*, 337 NLRB No. 29 (2001).

WE WILL NOT threaten to interrogate our employees regarding their union affiliation.

WE WILL NOT advise our employees or applicants that union-affiliated employees will be not hired.

WE WILL NOT threaten to discharge our employees for their affiliation with a union.

WE WILL NOT interrogate our employees regarding their union affiliation and membership.

WE WILL NOT refuse to consider for hire, or refuse to hire, applicants because of their affiliation with a union.

WE WILL NOT change our hiring practices or policies to deny employment to union-affiliated applicants.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the changes in our hiring practices or policies designed to deny employment to union-affiliated applicants.

WE WILL, within 14 days offer Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington instatement to a job for which they applied or a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

WE WILL make Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, together with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire or consider for hire applicants Rodney Booe, Stanley Grace, Jerry Loftis, Roger Stanley, Douglas Summers, Allen Craver, Gary Maurice, and Percival Millington, and WE WILL within 3 days thereafter notify the applicants in writing that this has been done and that the unlawful refusals to hire or consider for hire will not be used against them in any way.

JET ELECTRIC COMPANY, INC.